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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RULES PURSUANT TO 9 U.S.C. §404a	Docket No. RM2013-4

REPLY COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA
(August 28, 2013)

The Newspaper Association of America ("NAA")[1] submits these reply comments on the proposed rules to implement Section 404a of the Postal Accountability and Enhancement Act.[2] The opening comments identified several defects in the proposed rules which, if adopted, would contravene the statutory intent. In general, these defects arise from erroneously treating Section 404a as if it were an antitrust provision, instead of as a check on government monopoly power.

In response to the opening comments, NAA urges the Commission to adopt rules implementing Section 404a that:

- Prevent the Postal Service from abusing its government status and legal monopoly to benefit itself at the expense of its customers and rivals, which is a different standard than mere "unfair competition";
- Effectuate the purpose of Section 404a by not inventing a non-statutory requirement that complainants suffer actual harm, which in practice could well be irremediable, before filing a complaint;

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[1] NAA represents the interests of nearly 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

[2] Order No. 1739, Docket No. RM2013-4 (June 5, 2013) ("*Notice*"), 78 *Fed. Reg*. 35826 (June 14, 2013).

- Interpret and apply the term “rule, regulation, or standard” broadly in order to prevent the Postal Service from evading the statutory prohibition by simply denominating its action as something else; and

- Ensure that the burden of proof remains on the Postal Service, where Congress assigned it.

I. THE SECTION 404a PROHIBITION AGAINST POSTAL SERVICE MISUSE OF ITS STATUS IS NOT LIMITED TO FEDERAL UNFAIR COMPETITION LAW

Several parties commented that the Commission’s proposal as a policy matter to interpret Section 404a in a manner akin to federal unfair competition law (*Notice* at 7, *citing* 15 U.S.C. §45) misconstrues the statute and is fundamentally incorrect. *Public Representative Comments* at 8-10; *accord UPS Comments* at 5; *IDEA Alliance Comments* at 3. NAA agrees with those commenters, and urges the Commission to apply Section 404a as it was written by Congress, and not to rewrite it into something it was not intended to be.

That Congress did not intend for Section 404a simply to import federal unfair competition or antitrust standards is clear from principles of statutory construction and the text itself. First, Section §409(d)(2)(B) expressly applies the unfair competition provisions of Section 5 of the Federal Trade Commission Act to the Postal Service, and Section §409(e)(1)(B) applies the FTC Act, the Sherman Act, and the Clayton Act to Postal Service activities not reserved to it by 18 U.S.C. §1696. As UPS notes, construing Section 404a as an unfair competition and antitrust provision would render Section 409 superfluous. *UPS Comments* at 5. Had Congress wanted to apply the FTC Act, the Sherman Act, and the Clayton Act to “reserved” services, it easily could have done so clearly in Section 409. There is no basis for the Commission to do, via Section 404a rules,

what Congress deliberately chose not to do when it enacted both Section 404a and Section 409 at the same time.[3]

Second, the substantive text of Section 404a indicates that the statute is directed at something other than merely commercial trade regulation. It states:

> (a) Except as specifically authorized by law, the Postal Service may not—
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> > (1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;
> >
> > (2) compel the disclosure, transfer, or licensing of intellectual property to any third party (such as patents, copyrights, trademarks, trade secrets, and proprietary information); or
> >
> > (3) obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

These provisions establish violations separate and apart from normal competition law. Presumably the Postal Service could, through the actions prohibited by Section 404a, offer "greater efficiency or enhanced consumer appeal" (*Notice* at

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[3] The *Notice* states that the proposed rules have been modeled by analogy to the Federal Communications Commission's program access rules. Caution is appropriate when importing features of a different regulatory scheme. The program access and Section 404a situations differ significantly. The former address problems experienced by video delivery services (such as satellite television firms) seeking to carry program channels owned by vertically integrated video distributors (such as cable systems). By analogy, imagine a postal scenario in which UPS could bring a complaint against the Postal Service (the vertically integrated carrier) for using only Parcel Post to deliver packages from L'Enfant Plaza to the field. A better, but still imperfect, FCC comparison would be to the carriage agreement rules. However, defendants in FCC carriage agreement (or program access) proceedings are private businesses that have neither rulemaking authority nor a legal monopoly over distribution covering the entire United States. The Postal Service, in contrast, has both.

8), but Congress has said that it may not do so. Unlike Section 409, Section 404a makes no reference to the Federal Trade Commission Act or the antitrust laws. Section 404a uses the terms "preclude competition" and "unfair competitive advantage" to describe the type of a Postal Service "rule or regulation" that would fall within its scope but, as UPS points out (at 6), there is no evidence in the text or legislative history that Congress thereby intended to reiterate, superfluously, Section 409.

Put simply, Section 404a prevents the Postal Service from abusing its government status and legal monopoly to benefit itself to the detriment of its customers and rivals. The Section 404a focus on misuse of the Postal Service's powers is distinctly different than one based on competition laws. More than merely a restated antitrust standard, it holds the Postal Service to a prophylactic standard tied to misuse of its authority and legal monopoly in a vertically integrated network.

Third, it is a well-recognized principle of statutory construction that when Congress uses different words in a statute, it must intend different meanings. Indeed, the Commission itself acknowledged this principle earlier this month. *See* Order No. 1803, *Rules for Market Tests of Experimental Products*, Docket No. RM2013-5 at 4 (August 9, 2013). In that proceeding, the Commission proposed to interpret the term "year" in Section 3641 and its proposed rules to refer to a "fiscal year," observing that its interpretation is "consistent with the text" which also contains the terms "24 months" and "12 months." The same principle applies equally to this proceeding. The different wording of Section 404a --

"preclude" or "establish the terms of" competition as distinct from the language of the trade regulation laws -- requires a different construction.

II. THE COMMISSION'S RULES SHOULD IMPLEMENT SECTION 404a AS CONGRESS WROTE IT

Three issues raised in the opening comments are important to a proper application of Section 404a. These are: (1) the ill-advised proposal to require complainants to show actual harm; (2) preventing the Postal Service from circumventing the law by mislabeling its actions; and (3) the suggestion that the burden of proof should ever shift off of the Postal Service.

A. The Purpose Of Section 404a Would Be Eviscerated If Complainants Were Required To Show "Harm"

Several commenters pointed out that by requiring complainants to show "harm," the Commission would create a burdensome non-statutory obstacle to complainants seeking to forestall illegal activity by the Postal Service. *E.g., Public Representative Comments* at 8-10; *Pitney Bowes Comments* at 3; *UPS Comments* at 8. The Commission should eliminate the proposed requirement that a complainant show harm to consumers in order to bring a complaint.

Under the proposed rule, it is difficult to see what the complainant might argue. The Postal Service presumably routinely will argue that if the complainant loses business, or is driven out of the market, as a result of actions that violate Section 404a, such is merely the result of "competition" and is good for "consumers." The Postal Service can be expected to argue that it is "fair" and "beneficial for consumers" for it to offer a competing service at a lower price or with fewer mail preparation requirements. However, not one word in Section

404a mentions "consumers." Instead, the Section refers repeatedly to firms that find themselves, in some way, "competing" with the Postal Service. The purpose of Section 404a is to prevent the Postal Service from using its regulatory authority, its size, and its monopoly services to injure private firms that use its services.

The only *statutory* requirement for a Section 404a(a) complainant is to show that the Postal Service action (or inaction) either "preclude[s] competition" or "establish[es] the terms of competition," or that it compels the disclosure of intellectual property, or is based on information obtained from the rival. Congress did not require Section 404a complainants to show actual harm, either to themselves or to consumers. Accordingly, proposed rule 3032.5(a)(2) should be deleted in its entirety.

B. The Commission Should Prevent The Postal Service From Evading Section 404a By Labeling Impermissible Actions As Something Other Than "Rules" Or "Regulations"

The Postal Service contends that the Commission's proposed interpretation of "rule, regulation, or standard" is too broad. *Initial Comments of the United States Postal Service* at 5-6. Instead, it urges the Commission to conform its rules to the Postal Service's self-serving definition found in 39 C.F.R. Part 211. The Commission should have no trouble rejecting this absurdity.

First, it should be obvious that the Commission's power to adopt rules to implement Section 404a of the PAEA is not subject to the Postal Service's own definitions. The Commission's rules are subject only to the statute. Nothing in Section 404a requires or expects the Commission to apply Section 404a only to

those postal "rules or regulations" that the Postal Service chooses to label as such.

On the contrary, as other commenters noted, the Postal Service has a vast repertoire of labels – "instructions, manuals, guidelines, standard operating procedures," etc. – for its directives that dictate how mailers interact with the postal system. *Comments of Pitney Bowes Inc*. at 6 (statutory language is "expansive and illustrative"); *Joint Comments of Stamps.com and Endicia* at 4. The *Joint Comments* illustrate the need for a broad definition, noting, for example, that since 2005 the Postal Service's label for its own purchasing manual has changed twice from a biding regulation to nonbinding "Guidebook" and now a nonbinding "Practices and Principles." It is the effect, not the Postal Service's label that should govern the scope of the Commission's rule.

C. The Commission May Not Shift The Burden Of Proof Off Of The Postal Service, To Which Congress Assigned It

Section 404a prohibits certain Postal Service actions "unless [it] demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service." 39 U.S.C. §404a(a)(1). This language plainly assigns the Postal Service the burden of *proving* that its regulation *does not* create an unfair competitive advantage.

As UPS commented, this is a higher standard than a "nonpretextual" justification that shifts the burden of proof to a complainant, and differs materially from that taken by the trade regulation laws. *UPS Comments* at 7. Congress's decision to assign the ultimate burden of persuasion to the Postal Service makes sense. The Commission should not shift what Congress has assigned.

III. CONCLUSION

For the foregoing reasons, the Newspaper Association of America urges the Commission to modify its proposed rules implementing Section 404a to more closely adhere to the statutory intention.

Respectfully submitted,

Newspaper Association of America

Paul J. Boyle
Senior Vice President/Public Policy
NEWSPAPER ASSOCIATION OF AMERICA
4401 Wilson Boulevard
Suite 900
Arlington, Virginia 22203
(571) 366-1150

By: /s/ William B. Baker_____
William B. Baker
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006-2304
(202) 719-7255